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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 141 Term, 1950.

PAUL A. PORTER, Administrator, Office of Price Administration, now UNITED STATES OF AMERICA,
Appellee,

vs.

SUNSHINE PACKING CORPORATION OF PENNSYLVANIA,
Appellant.

From The District Court of the United States for the Western District of Pennsylvania at 2869 (Civil Action)
And
The United States Court of Appeals for the Third Circuit at No. 9841.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

JURISDICTIONAL STATEMENT APPENDED.

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PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of the Sunshine Packing Corporation of Pennsylvania, defendant and appellant, respectfully represents the following:

1. Originally this action for $412,213.83 (treble damages) was brought by Chester Bowles, Administrator of the Office of Price Administration, against the Sunshine

Packing Corporation of Pennsylvania in the District Court of the United States for the Western District of Pennsylvania for alleged violations of OPA ceiling prices in the sales of fruits and fruit juices. By amendment the United States of America is now plaintiff of record and here the appellee.

2. The case was tried before the Honorable Wallace S. Gourley and jury at Erie, Pennsylvania, September 17-25, 1946. The verdict of the jury, upon specific findings of fact, was in part for the plaintiff and in part for the defendant. The verdict of the jury for the plaintiff was in the sum of $7194.16 (single damages) which was doubled by the honorable trial judge on special jury findings that the violations alleged were not wilful but due to negligence. Motion for judgment *non obstante veredicto* having been refused, an appeal was taken from the judgment of $14,388.32, so entered, to the United States Court of Appeals for the Third Circuit which affirmed in part and reversed in part thereby reducing the judgment, as doubled, to $9,370.32. So much of the opinion, (Leahy, District Judge) as deals with the question presented for review is filed herewith as Exhibit "A", opinion being filed April 7, 1950.

3. The United States of America now being plaintiff of record, the action having been upon Acts of Congress and administrative rules and regulations based thereon and the action having been brought in the District Court of the United States for the Western District of Pennsylvania, there is involved no question as to the jurisdiction of the Supreme Court of the United States upon appeal.

4. The concrete question presented for review and for argument, if appeal is allowed, is the following:

(a) Where a statute or governmental rule or regulation with the force of a statute, dealing with the cost, processing and sale of a commercial commodity, is silent as to the method of cost computation, can a governmental accountant arbitrarily reject the time honored custom of considering the "yield" (or conversely "wastage") of the particular commodity (here fruits) and eliminate that factor as an essential of proper and fair cost calculation?

(The District Court and the United States Court of Appeals decided he could).

As corollaries to the above are the following:

(b) Is an attack on a method of cost computation which eliminates "yield" (or conversely "wastage") in effect an attack on the validity of the law, rule or regulation (here OPA regulation) so as to compel a District Court to divest itself of jurisdiction in favor of the Emergency Court of Appeals, specifically constituted by Act of Congress to adjudicate the validity of OPA rules and regulations?

(The District Court and Court of Appeals decided this affirmatively).

5. The special and important reasons urged for the allowance of appeal, in addition to the actual money involved are:

(a) The method and manner of governmental cost computation in this case, as approved by the District Court and Court of Appeals, can become a dangerous and upsetting precedent generally because it repudiates the time honored custom of considering "yield" (or conversely "wastage") as one of the primary elements in figuring costs and so could have a most disrupting effect in all cost accounting not only in

cases *sui generis* but in income tax cases and in other situations where this particular factor is involved.

(b) In arriving at its decision on the question here presented for review the District Court denied to defendant and divested itself of jurisdiction to pass upon a question properly justiciable before it and in favor of the Emergency Court of Appeals by holding that an attack on a method of cost calculation was, in effect, an attack on the validity of the maximum price regulation itself which, it is submitted, is a *non sequitur* as defendant, at no time, has had any quarrel with the maximum price regulation, as such, and had no way of knowing how costs were to be figured under it by the governmental accountant assigned to the case and under these circumstances how would defendant have had any standing to appeal to the Emergency Court of Appeals?

WHEREFORE your petitioner respectfully prays your Honorable Court for allowance of review on a writ of certiorari.

S. Y. ROSSITER,
Attorney for Petitioner.

County of Erie,
State of Pennsylvania. } ss.:

Before me, the subscriber, personally came FRED L. RAHAL, who being duly sworn according to law deposes and says that he is president of the defendant company, petitioner, and as such is authorized to make this affidavit on its behalf; he is familiar with the facts hereinabove set

forth and that the same are true and correct to the best of his knowledge, information and belief.

FRED L. RAHAL,
President of Sunshine Packing Corporation of Pennsylvania.

Sworn and subscribed to before me
this 14th day of June, 1950.
Gertrude Gross,
Notary Public.
My Commission expires January 7, 1953.

(Notarial Seal)

Exhibit "A".

2. The question here is whether the Court below was correct in holding that MPR 185 covering strawberry and black raspberry juice, and MPR 409 covering currants, were silent on the necessity of including in cost computations the factor of yield (or conversely, the wastage) in the processing of the fruits involved between the time they left the field where they were harvested and were finally sold. The Court below held such computation should not be included in the calculations fixing ceiling prices. Appellant urges that this ruling was error for two reasons: (1) the regulations did require that yield be calculated as an element of cost price for ceiling purposes and (2) even if the regulations were silent, judicial notice must be taken of the universal acceptance of the factor of yield in cost computations. Hence it is urged, the regulations implicitly included yield as a factor in determining ceiling price. This is the crux of appellant's case for it hammers the

point that "yield" or "wastage" plays an important part in arriving at the actual cost of its products; and that wastage always occurs between the time the appellant receives its food products and the time the processed products are ready for marketing. In support of this argument appellant states that OPA itself has recognized that yield and wastage may be considered in the computation of cost in the manufacturing industry. But, the regulation to which reference is made—MPR 306—admittedly is not involved in the instant case. As a general proposition, we agree that yield is always an item of cost; however, the regulations involved in the case at bar are silent on the matter. This particular attack, on the failure of the regulations to provide that "yield" or "wastage" should be taken into account in fixing prices after the base period, goes to validity of the regulations as they existed in point of time when appellant was selling its products. As stated above, on the authorities cited, the regulations must be treated as valid until declared invalid by the special court. (Emergency Court of Appeals). (Italicized designation supplied).

BRIEF IN SUPPORT OF PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

If allowed to stand, the decision in this case can be most disruptive of time-honored, well recognized and accepted business and accounting practices, not only in governmental purposes but in commercial accounting generally, because judicial sanction is here given to a governmental accountant working under an administrative regulation, with the force and effect of an Act of Congress, computing costs, arbitrarily as he sees fit, by leaving out a very elemental and substantive factor, viz: "YIELD" (or conversely, "wastage") and justifying the same by saying that the regulation in question was silent on whether "YIELD" should or should not be included in cost calculation.

As succinctly stated in the opinion of the United States Court of Appeals for the Third Circuit and quoting, *ipsissimis verbis,* the legal position of petitioner on this question is two-fold:

> "(1) The regulations did require that yield be calculated as an element of cost price for ceiling purposes and
>
> "(2) Even if the regulations were silent, judicial notice must be taken of the universal acceptance of the factor of yield in cost computations."

In view of the fact that the latter of the above two is the more general and comprehensive, it will here be discussed first.

It would be "carrying coals to Newcastle" to here regale this Honorable Court in detail, with the principles of judi-

cial notice. However, for ready reference, and, as pertinently serving out immediate purpose, we will utilize the following:

> Judicial notice is taken of the general usages and customs of the country, particularly the general and well known mercantile customs and usages and the general business methods and practices.
>
> 20 American Jurisprudence, P. 119.
>
> Judicial notice will also be taken of matters of common knowledge concerning the raising and marketing of farm products.
>
> 31 *Corpus Juris Secundum,* PP. 557-558.
>
> Within these general rules judicial notice has been taken to particular matters relating to * * * *, citrus fruit, and of particular matters relating to * * * fruit growers * * *.
>
> 31 *Corpus Juris Secundum,* PP. 558-559.

Surely it needs no extended argument to demonstrate that the "yield" or, conversely, the shrinkage and wastage in fruit between its harvesting and its marketing, after its processing, is a matter of such common knowledge as to be squarely within the purview of the above quoted excerpts. The approximate percentage of "yield" was proven by defendant's evidence as to each item here involved and if "yield" had been allowed no verdict could have been rendered for the plaintiff as to such items for the reason that such added costs would then have justified defendant's sale price of these particular items under their respective OPA regulations.

The importance and, indeed, the danger, of the decision in this case, as it now stands, is that it is of general application. The tailor using four yards of cloth out of a five yard bolt to make a suit of clothes could not take into ac-

count the yard he lost; the carpenter cannot charge for his sawed off boards, in fact, every processor or manufacturer of a raw or basic commodity could be stuck with the loss resulting from the normal manufacturing shrinkage and wastage of his product.

It is our contention that any statute or regulation with the force thereof cannot strike down a universal business practice of long standing without express language to that effect or by inference so plain and clear as to be equivalent thereof and that silence gives consent and not dissent.

In conclusion on this point it is respectfully submitted that while the Office of Price Administration may be largely a thing of the past yet the business accounting principle, here judicially sanctioned, can be a poisonous legacy if allowed to stand.

Now taking up the first legal position enunciated that the maximum price regulations here involved (abbreviated for convenience and designated MPR 185, 7 Fed. Reg. 5772 and MPR 409, 8 Fed. Reg. 8353), require that "yield" be calculated as an element of cost pricing for ceiling purposes, the argument becomes more technical and involved. In discussing the same we will endeavor, as best we can, to follow the spirit of the rule of this Honorable Court that this argument shall be brief.

By the way of background, however, and to make the same understandable it is necessary to say that under congressional legislation the first general and omnibus OPA price regulation was "General Maximum Price Regulation," commonly designated GMPR, 7 Fed. Reg. 3153, which froze all prices as af March 1942 and which necessarily left the matter of price calculations in *status quo*. As time and investigation developed the need of specific treatment for specific commodities the latter were with-

drawn from the provisions of GMPR and became the subject matter of special price regulations and so MPR 185, applying to canned fruits, and MPR 409, applying to frozen fruits, were duly born during the year of 1942 and subsequently MPR 306, 8 Fed. Reg. 1114, became the successor and the 1943 edition of MPR 185.

When OPA was in the early stages of its enormous task the scope of its work necessarily had to be of general nature rather than specific and, consequently, for the early MPR 185 no price formulas or guiding forms were worked up by OPA in detail so that fruit canners naturally and necessarily had to rely on the previous general business customs and practices in that business and the same would hold true as to MPR 409. While it is here conceded that the word "yield" does not specifically appear in either and while we will not encumber this argument with their full repetition yet it is submitted that a fair reading of them in the Federal Register, at the citations hereinabove given, will fully support the contention of the Petitioner-Appellant in this case.

By the time that MPR 306 came into being in 1943 there had then been afforded to OPA the time to work up specific price formulas and written forms which did specially and specifically provide for the calculation of "yield" with a special column in the particular forms with "yield" as the caption thereof. In the lower Court and upon the Court of Appeals it was the contention of appellant that all these pricing regulations had to be considered *in pari materia*, basing this legal position largely on the following from Pages 54 and 55 from Endlich on "Interpretation of Statutes."

> SEC. 43. EARLIER ACTS IN PARI MATERIA. Where there are earlier acts relating to the same subject, the survey

must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law (a), and each of them may explain and elucidate every other part of the common system to which it belongs.

The Court of Appeals struck down this argument by the simple statement "The regulation to which reference is made—MPR 306—admittedly is not involved in the instant case." True, it is, that no violations of MPR 306 were charged in the complaint but it is earnestly contended that MPR 306 was based upon MPR 185, grew out of it and its 1943 successor and that any interpretation placed by OPA upon MPR 306 necessarily had to relate back to MPR 185. Pricing under one could not be upon a different base or upon a different theory then pricing under the other and that, being *in pari materia*, the formulas and forms under MPR 306 were competent evidence as interpretative of MPR 185, born in the early confusion of OPA and without the luxury of concomitant forms and formulas.

Viewed in this light the conclusion seems almost irresistible, even discounting our enthusiasm for our case, that "yield" should have been calculated in the pricing of the three items remaining in this lawsuit and, if so, that portion of the judgment of the United States Court of Appeals for the Third Circuit should be reversed which affirmed the method of calculation of which complaint is here made and appeal allowed for urging the foregoing position before this Honorable Court.

Respectfully submitted,

S. Y. Rossiter,
Attorney for Petitioner-Appellant.

Jurisdictional Statement.

(a) Jurisdiction of The Supreme Court of The United States under Section 1254 United States Code, Act of June 25, 1948, c. 646, 62 Stat. 928, annotated in 28 United States Code Annotated, Page 42.

(c) The date of judgment sought to be reviewed is April 7, 1950.

The question here involved is substantial in amount and also substantial by reason of the fact that if the decision is allowed to stand it can be disruptive of general accounting practices.

Copy of the opinion of the learned lower Court (District Court of Pennsylvania for the Western District, Honorable Wallace S. Gourley) as same pertains to the question here involved is as follows. The portion of the opinion of the United States Court of Appeals for the Third Circuit is appended to the Petition as Exhibit "A."

Question II.

That as to strawberry juice, black raspberry juice and currants, the court erred in not directing a verdict for the defendant for the reason that the percentage of yield in the case of each of said items should have been computed and included in the calculations as to ceiling prices.

It is in substance the contention of the defendant that the proposition of "yield" or, conversely, of "wastage" and the part that yield and wastage play in the computation of cost is of such major importance that the district court should take judicial knowledge of settled business practices as to the part which yield or wastage plays in arriving at the actual cost of a product. That wastage or yield

must occur between the time that the defendant receives the agricultural commodities or food products and the time that the finished or processed product is ready for selling or marketing. That in the coring, peeling, stemming, culling, leavening and other debris which must be done in order to have the finished or processed product available for sale, a direct cost is involved which should be considered in computing the selling price. That the Court should take judicial notice of the fact that in calculating costs in accordance with customs from time immemorial, wastage must be calculated to arrive at true cost. That since the government's regulation contained no proviso as to the consideration of yield or wastage in the computation of the ceiling price, the failure to have such inclusion in the regulation amounted to the government consenting and recognizing that yield or wastage should be included. That in every manufacturing industry the cost of raw materials and wages are the outstanding elements in the conversion of the raw materials into finished products, yet just as elemental and fundamental are such factors as yield or wastage.

The defendant says in brief that the Court should take judicial notice of the custom which exists in the computation of cost, and that since the regulations was silent as to including yield in the computation of cost, the Court should consider the custom as part of the regulation.

Judicial knowledge may be defined as the cognizance of certain facts which a judge under the rules of legal procedure or otherwise may properly take or act upon without proof because they are already known to him or because of that knowledge which a judge has, or is assumed to have, or merely another way of expression that the usual forms of evidence will be dispensed with if the fact is one of such public concern or notoriety which is known generally

by all well-informed persons. As has been said, judges will not shut their minds to truths that all others can see and understand. 15 R. C. L. 1191; 20 American Jurisprudence 46, 47; 31 C. J. S. 510, 511, 512, 545, 544; 20 American Jurisprudence 49, 50.

A custom of business in a specific trade is a matter of judicial cognizance if it is sufficiently notorious. 20 American Jurisprudence 119.

In addition to the foregoing, the defendant contends that even if the district court does not believe that judicial notice should be taken of the custom and usage in the manufacturing industry, yield and wastage should be considered in the computation of cost since the Office of Price Administration at the time MPR 306 was issued, which was not involved in this action in any way whatsoever, provided for the consideration of yield or wastage in computing cost. That since MPR 306 is so similar to the other regulations involved, with the exception of the provisions as to yield or wastage being considered in the computation of costs, they should be *in pari materia.*

Unquestionably, the argument presented to the Court involves the consideration of a matter that generally is acceptable in business as an important part of the actual cost of the processed or manufactured article or commodity. However, this question, in my judgment, again goes to the validity of the regulations which are involved, and it is the duty of the district court to treat the regulations as valid unless and until declared invalid by the Emergency Court of Appeals or the Supreme Court. *Suwanee Fruit and Steamship Co. v. Fleming, supra; Shrier v. U. S., supra.*

S. Y. Rossiter,
Attorney for Petitioner-Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 141

SUNSHINE PACKING CORPORATION OF PENNSYLVANIA, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, NOW UNITED STATES OF AMERICA [1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 269-276) is reported at 181 F. 2d 348. The opinion of the District Court (R. 236-263) is reported at 81 F. Supp. 566.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1950 (R. 277). The petition for

[1] This is the caption of the case as it appears in the record. The action was originally brought by Chester Bowles, the then Administrator of the Office of Price Administration, who was later succeeded by Paul Porter as plaintiff (R. 1). After the O.P.A. was terminated, the United States of America was substituted as party plaintiff (R. 235).

a writ of certiorari was filed on June 21, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Maximum Price Regulations Nos. 185 and 409 established ceiling prices for certain processed foods and provided that, in determining the canner's maximum price, an allowance should be made for the actual increase over the base period in the cost of the raw agricultural commodity. The question is whether, in an action for treble damages by the Government, it was open to petitioner to challenge the validity of the computation of ceiling prices under the regulations which eliminated as a cost factor any increases over the base period in the actual wastage of raw material in processing.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 and the maximum price regulations issued thereunder are set forth in the Appendix, *infra,* pp. 9-16.

STATEMENT

In January 1944, the Price Administrator, on behalf of the United States, filed an action for treble damages under Section 205(e) of the Emergency Price Control Act of 1942 charging that petitioner, a corporation engaged in the business of packing and processing various types of fruit, sold and delivered from Febru-

ary 1, 1943, to and including June 21, 1943, strawberry juice, black raspberry juice, and frozen red currants to named purchasers (Ex. II, R. 11; Ex. IV, R. 15, at prices higher than the maximum prices permitted by M. P. R. No. 185, covering the juices, and No. 409, which had incorporated M. P. R. No. 207, covering the currants (R. 5-7).[2] Petitioner filed an answer and an amended answer (R. 44-54) in which it alleged, *inter alia,* that the alleged sales of strawberry juice, black raspberry juice, and currants were not made at excessive prices because the correct ceiling prices were higher than those computed by the Government (R. 46-47, 48, 52, 53). At the trial it was established that in computing the ceiling prices for those products the Government did not include as a cost factor increased wastage of the raw material over the base year 1941 (R. 56-63, 77, 83). M. P. R. Nos. 185 and 409 did not allow for such increased wastage (R. 56-63, 77, 83) and the prices charged by petitioner in respect of the sales here involved would not have been in excess of the maximum price ceilings if increased wastage had been considered as a factor in cost computation (R. 76-78, 80-81, 83). In addition, petitioner unsuccessfully sought to

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[2] Petitioner was also charged with selling and delivering canned crabapple juice, grape juice and strawberries in violation of General Maximum Price Regulation and M. P. R. Nos. 207 and 409 (R. 5-7), but none of these alleged violations are involved here. (See *infra,* pp. 4, 5.)

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Sec. 204	8, 10
Sec. 205	2, 11
Maximum Price Regulations:	
No. 185 (7 F.R. 5772)	3, 4, 5, 6, 7, 12
No. 207 (8 F.R. 2977-2978)	3, 4, 5, 7, 13
No. 306 (8 F.R. 1114-1116)	4, 7
No 409 (8 F.R. 8358-8359)	3, 4, 5, 6, 7, 15

establish that price ceilings under M. P. R. Nos. 185, 207 and 409 were to be computed in the same manner as price ceilings under M. P. R. No. 306, which later replaced Nos. 185, 207 and 409 and which clearly considered current yield as a cost factor (Def. Exs. "LL" and "MM", R. 151-163, 64-68), but the court ruled that No. 306 was irrelevant in this action since it covered prices subsequent to the period involved here (R. 68).

At the conclusion of the trial, the judge charged the jury, *inter alia,* as follows (R. 185, 218):

> * * * under Maximum Price Regulations Nos. 185, 207, 409, the question of yield cannot be considered in computing the allowable "actual increases in the cost of the raw agricultural commodity" mentioned therein.

The jury found that petitioner violated the price ceilings as alleged in the complaint in the sale of strawberry juice, black raspberry juice, currants and crabapple juice (R. 226, 229-232), but that it did not violate the price ceilings in the sale of strawberries and grape juice (R. 226, 227-229). Since the jury also found that the violations, though not wilful, were the result of failure to exercise practicable precautions to comply with the ceiling price (R. 229-232), the court entered judgment for the Government for double the amount of the overcharges found, or a total of $14,388.32 (R. 264).

On appeal, in addition to the question involved here, petitioner raised others which are not renewed here. The Court of Appeals affirmed the judgment in respect of the sales of black raspberry juice, currants and strawberry juice, but reversed the judgment in respect of the sales of crabapple juice, thus reducing the judgment to $9,370.32 (R. 276, 277).

ARGUMENT

Petitioner's sole contention here, which was rejected by both the District Court (R. 251-253) and the Court of Appeals (R. 271-272), is that the maximum price ceilings for strawberry juice, black raspberry juice and currants computed by the Government under M. P. R. Nos. 185 and 409, which incorporated M. P. R. No. 207, failed to include yield or wastage of the raw agricultural commodities as an element of cost and accordingly were erroneous. Petitioner argues that this method of pricing "can become a dangerous and upsetting precedent generally because it repudiates the time honored custom of considering 'yield' (or conversely 'wastage') as one of the primary elements in figuring costs" (Pet. 3). But the contention ignores the fact that under M. P. R. No. 185, section 1341.102(a), No. 207, section 1341.202(a), and No. 409, section 3(b), the first element considered in pricing was the f. o. b. factory price charged by the canner for the 1941 pack. Petitioner's 1941 prices undoubtedly reflected wastage,

so that what petitioner is really complaining about is that the Government's computations under M. P. R. Nos. 185 and 409 covering 1942 and subsequent packs confined it to the same yields as it had in processing the 1941 packs and made no allowances for decreased yields in subsequent packs, although the regulations specifically allowed increases in the costs of raw materials to be added to the 1941 prices.

Petitioner does not deny that M. P. R. Nos. 185 and 409 did not expressly provide that actual yield was a factor to be considered in determining allowable increases in raw material costs and consequently in the price ceiling (Pet. 3, 10), but argues that since the regulations were silent on this question, the courts should take judicial notice of the universal acceptance of the factor of yield in the cost of raw material (Pet. 7-9). We submit that petitioner is in error in stating that the regulations were silent on this question. Although the regulations did not expressly state that decreased yield or increased wastage was to be disregarded, the elements set forth therein which the canner used in determining ceiling prices negate the consideration of actual yield as a factor in increased costs of raw material. For example, section 1341.102 (a) (3) of M. P. R. No. 185, which was substantially similar to M. P. R. No. 409, section 3(b)(1), allowed the canner to add to his 1941 price "the actual increase * * * in the cost of the raw agricultural

commodity" for the 1942 pack over the cost of the same raw materials for the 1941 pack. Section 1341.102(b)(2)(i) and (ii) defined "actual increase in the cost of the raw agricultural commodity" as the difference between the weighted average cost to the canner of the raw material purchased for the 1941 pack and the weighted average cost of such material for the 1942 pack and stated that the weighted average cost was to be computed by "dividing the total amount paid [for the raw material] by the number of tons or other units purchased." This definition, by providing that the cost of the raw material was to be computed by dividing the total amount paid by the number of units purchased, rather than by the number of units available for canning after processing, clearly eliminated decreased yield or increased wastage after the base year 1941 as a factor in cost pricing.

Petitioner's reliance (Pet. 10-11) on M. P. R. No. 306 (8 F. R. 1114-1116) was correctly rejected by the Court of Appeals (R. 272) and the District Court (R. 253) because it did not determine the price ceilings involved in the instant case and had no effect on them. The fact that it replaced M. P. R. Nos. 185, 207 and 409 is not significant in view of the provisions of those regulations.

In view of the foregoing, petitioner's challenge of the validity of the price computations under the regulations in that they did not reflect the actual

wastage of raw material in the processing of the commodities involved is in effect a claim that the regulations were invalid and accordingly is not a question that can be considered in this action. Such a claim is within the exclusive jurisdiction of the Emergency Court of Appeals (Emergency Price Control Act of 1942, Sec. 204 (d)) and of this Court on certiorari. *Yakus* v. *United States,* 321 U. S. 414, 427-431; *Rosensweig* v. *United States,* 144 F. 2d 30, 33 (C. A. 9), certiorari denied, 323 U. S. 764. Furthermore, there is no merit in petitioner's contention that it had no standing to resort to the Emergency Court of Appeals (Pet. 4). See Emergency Price Control Act of 1942, Sec. 203 (a), Appendix, *infra,* pp. 9-10.

CONCLUSION

The decision below is correct. No question of importance or conflict of decisions is presented. The petition for certiorari should be denied.

Respectfully submitted,

ARNOLD RAUM,
Acting Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

AUGUST, 1950.

APPENDIX

The Emergency Price Control Act of January 30, 1942, c. 26, Title II, 56 Stat. 29, provided in pertinent part:

Sec. 203. Procedure

(a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date

thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

Sec. 204 Review

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall

have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, * * * *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * *

* * * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Sec. 205. Enforcement

* * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed * * *.

2. Maximum Price Regulations Nos. 185, 207 and 409 provided in pertinent part:

No. 185 (7 F. R. 5772):

§ 1341.102. *Canner's maximum prices for canned fruits and canned berries.* (a) The canner's maximum price per dozen f. o. b. factory, for each kind, grade, and container size of canned fruits or canned berries packed after the 1941 pack shall be: (1) The weighted average price per dozen f. o. b. factory charged by the canner for such kind, grade and container

size during the first 60 days after the beginning of the 1941 pack; plus

* * * * *

(3) The actual increase per dozen cans in the cost of the raw agricultural commodity delivered at the factory for the 1942 pack over the cost of the same raw agricultural commodity delivered at the factory for the 1941 pack.

(b) In determining the canner's maximum price:

* * * * *

(2) The "actual increase in the cost of the raw agricultural commodity" shall be the difference per dozen cans of each kind, grade and container size, between;

(i) The weighted average cost to the canner of the raw agricultural commodity purchased for the 1941 pack, computed by dividing the total amount paid by the number of tons or other units purchased; and

(ii) The weighted average of the prices per ton or other unit, paid or contracted to be paid by the canner to the grower for the same raw agricultural commodity in 1942, based on not less than the first 75 percent of his 1942 purchases.

* * * * *

No. 207 (8 F. R. 2977-2978):

§ 1341.202 *Packer's maximum prices for frozen fruits, berries and vegetables.* (a)

The packer's maximum price per dozen or other unit f. o. b. factory for each kind, grade and container size of frozen fruits, berries and vegetables packed after the 1941 pack shall be:

(1) The weighted average price per dozen or other unit f. o. b. factory charged by the packer for such kind, grade and container size during the first 60 days after the beginning of the 1941 pack, revised to reflect no more than seven months' storage in the case of quick-frozen fruits, berries and vegetables and no more than thirty days' storage in the case of cold-packed fruits, berries and vegetables; plus

* * * * *

(3) The actual increase per dozen or other unit in the cost of the raw agricultural commodity delivered at the factory in 1942 over the cost of the same raw agricultural commodity delivered at the factory for the 1941 pack, except as hereinafter limited in paragraph (b) (2) of this section.

(b) In determining the packer's maximum price:

* * * * *

(2) The "actual increase in the cost of the raw agricultural commodity" shall be:

(i) The difference per dozen or other unit of each kind, grade and container size between (*a*) the weighted average cost per unit to the packer of the raw agricultural commodity purchased for the 1941 pack, computed by divid-

ing the total amount paid by the number of units purchased, and (*b*) the weighted average of the prices per unit, paid or contracted to be paid by the packer to the grower for the same raw agricultural commodity in 1942, based on not less than the first 75 per cent of his 1942 purchases: * * *

No. 409 (8 F. R. 8358-8359):

Sec. 3. *Maximum prices which packers may charge for frozen fruits, berries and vegetables packed and frozen in containers other than barrels*—(a) *General pricing method.* The packer shall figure a maximum price per dozen or other unit, f. o. b. shipping point, for each separate kind, grade, style of pack, container type and size of frozen fruits, berries, and vegetables packed and frozen, after the 1942 pack, in containers other than barrels. The maximum price for such an item, including all storage, shall be figured by adding together his base price and his permitted increase for miscellaneous costs.

(b) *Base price.* The packer's base price in each case shall be his maximum price, f. o. b. factory, for the item under Maximum Price Regulation No. 207, after it has been adjusted for raw material costs. * * *

(1) *Adjustment for commodities included in the Commodity Credit Corporation's raw materials program.* In the case of commodities included in the Commodity Credit Corporation's raw materials program the packer shall adjust for raw material costs in each case, as

follows: First, he shall determine the weighted average cost for raw materials used in the 1942 pack of the product which he figured under § 1341.202 (b) (2) of Maximum Price Regulation No. 207. If this figure is *less* than the price at which the Commodity Credit Corporation will resell the raw product to packers in that area, after these figures have been converted to cents per dozen or other unit of the finished product, the difference between them shall be added to the maximum price for the item under Maximum Price Regulation No. 207. If this figure is greater than that resale price, after conversion to a finished product basis, the difference between them shall be subtracted from the maximum price for the item under Maximum Price Regulation No. 207. The figure resulting from this addition or subtraction is the packer's base price in sales to purchasers other than United States agencies.

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